No. 14,883

IN THE

United States Court of Appeals

For the Ninth Circuit

LEON D. URBAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court for the District of Alaska, Fourth Division.

BRIEF OF APPELLANT.

WARREN A. TAYLOR,
JULIEN A. HURLEY,
Fairbanks, Alaska,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

Table of Authorities Cited

No. 14,883

IN THE

United States Court of Appeals

For the Ninth Circuit

LEON D. URBAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court for the District of Alaska, Fourth Division.

BRIEF OF APPELLANT.

STATEMENT OF JURISDICTION.

This is an appeal from a judgment of conviction of manslaughter of the District Court for the District of Alaska, Fourth Division, under which appellant was given the maximum penalty of twenty years imprisonment.

The jurisdiction of the District Court to try this case is conferred by Title 48 U.S.C.A. Section 101, establishing a district court for the District of Alaska, with general jurisdiction of this Court as set out in 28 U.S.C. Sections 1291 and 1294.

STATEMENT OF POINTS RELIED UPON.

(1) The District Court erred in denying defendant's motion for an acquittal at the close of plaintiff's evidence and at the close of all the evidence.

(2) The District Court erred in admitting in evidence the enlarged pictures of the body of the deceased, Myrtle Patricia Cathey, which enlargements were distorted, over the objection of the attorneys for defendant.

(3) The District Court erred in refusing to instruct the jury regarding the law of circumstantial evidence at the request of the attorneys for defendant.

STATEMENT OF THE CASE.

The appellant, Leon D. Urban, was indicted for murder in the first degree in violation of Section 65-4-1 of the Alaska Compiled Laws Annotated, 1949. The indictment charges that appellant, on the 22nd day of January, 1955, purposely, and with deliberate and premeditated malice, feloniously assaulted Myrtle Patricia Cathey by beating her with his fist and other objects, the exact description of which were unknown, and that she died on or about the 31st day of January, 1955.

The only evidence produced by the Government of an assault by appellant upon Myrtle Patricia Cathey, on the 22nd day of January, 1955, was the testimony of a cab driver by the name of Marvin T. Jennings (Tr. 189, 194, 208, 217, 219). He testified

that he heard appellant slap or strike deceased but that he did not see him slap her (Tr. 200). He was driving appellant and the deceased in a cab from the Players Club in Fairbanks to the Alibi Club in Fairbanks. The Alibi Club was a saloon operated by appellant and the deceased Myrtle Patricia Cathey and the Players Club was also a saloon in Fairbanks, Alaska. The Alibi Club is located about seven or eight tenths of a mile from the Players Club. The said Marvin T. Jennings testified that when he arrived at the Alibi Club with the two passengers, the appellant got out of the car and went to the door of the Alibi Club and unlocked and opened the door and returned to the cab and dragged the deceased from the cab, a distance of ten or fifteen feet, by the hair of her head. According to the testimony of Dr. Harvey W. Anderson (Tr. 38, 62, 68, 90, 112, 99, 115), when he examined the deceased on the 22nd day of January, 1955, he found no evidence that she had been dragged by the hair of her head ten or fifteen feet from the car to the Alibi Club. According to the testimony of Dr. Henry Storres (Tr. 569, 573, 577) and the testimony of Dr. Paul B. Haggland (Tr. 630, 632, 637), there would undoubtedly have been some evidence in regard to the condition of the scalp of the deceased if the testimony of the said Marvin T. Jennings were true. When the witness, Marvin T. Jennings, was cross-examined he said that he had never hauled the deceased in his cab but the one time and denied that he ever took her to the Bluebird. The Bluebird was also another saloon in the town of Fairbanks, Alaska. This testimony was in direct conflict

with the testimony of Bill Anders (Tr. 578, 584, 588, 589). Dr. Anderson, in his testimony, testified that he could not, from an examination of the wounds on the head of deceased, tell whether or not any type of instrument was used to inflict the wounds. He was also allowed to testify that he believed the mouth lacerations could be well explained by a fist. An attempt was made by appellee to show that appellant was guilty of criminal negligence and evidence was introduced for that purpose (Tr. 63, 64, 65). Dr. Anderson testified that he was called by Mr. Urban about eight-thirty o'clock on the evening of the 30th day of January, 1955, to see the deceased because she showed signs of becoming critically ill. That he examined her and advised that she be sent to the hospital which was done and she arrived in the hospital about nine-thirty o'clock on the evening of January 30, 1955. According to the testimony of the doctor, he knew the proper operation to perform to relieve the pressure on the brain of deceased and although he was sent for several times he did not appear at the hospital until after her death on the early morning of January 31, 1955. In his testimony he further stated that he would have been able to aid the deceased if he had seen her the day after she received the injuries. The doctor also testified that none of the bruises on her legs or body had anything to do with the cause of her death. The doctor also stated that the hemorrhage causing the death of the deceased could have been a spontaneous hemorrhage (Tr. 94).

Dr. Harvey W. Anderson never testified, after stating that he knew the proper operation to perform,

what the effect would have been if he had operated on the deceased after he ordered her to be sent to the hospital. He testified that the cause of her death was due to pressure on her brain and that the pressure could have been relieved by the proper operation and the natural conclusion is that the appellant should not be blamed and held responsible for the failure of the doctor to perform the operation he knew was necessary in order to save her life.

ARGUMENT.

THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MOTION FOR AN ACQUITTAL AT THE CLOSE OF PLAINTIFF'S EVIDENCE AND AT THE CLOSE OF ALL THE EVIDENCE.

As stated in the statement of the case, the only evidence of an assault by appellant on Myrtle Patricia Cathey, on the 22nd day of January, 1955, was a cab driver by the name of Marvin T. Jennings. There was also the testimony of Frank Meyers, a witness called by appellee (Tr. 234-257), whose testimony was admitted over the objection of the attorneys for appellant. Before the objection, the witness testified as follows (Tr. 235-236):

"Q. When is the last time that you went there that you remember?

A. Oh, shortly after New Year's.

Q. Of this year, 1955?

A. Yes.

Q. Who was there at that time?

A. Mr. Urban and Myrtle.

Q. What time was that?

A. Oh, about nine o'clock.

Q. In the evening or in the morning?
A. Evening.
Q. Was there anyone else there at that time?
A. One other man.
Q. What did you do there?
A. I sat at the bar and bought a drink.
Q. Where was Myrtle Cathey?
A. She was at the bar.
Q. Where was Mr. Urban at that time?
A. Well, at that time he was out somewheres. I don't know where.
Q. Did he come into the bar at all?
A. Yes.
Q. Where were you when he came in?
A. Sitting at the bar with Myrtle.
Q. Did you see what Mr. Urban did when he came in?
A. He sat down aside of Myrtle at the bar."

After the objection and considerable argument by counsel the witness Meyers was permitted to testify as follows (Tr. 251-252):

"By Mr. Stevens. Q. Now, Mr. Meyers, if you recall that occasion, what happened, if anything, after that?
A. Well, they got in an argument and he backhanded her one.
Q. And what happened at that time?
A. Well, then she fell off the stool. In a minute or two she got up and sat on the other side of him.
Q. How long were you there at that time?
A. About fifteen minutes, thirty minutes.
Q. Did you hear the argument?
A. No, paid no attention to it.

Q. Did you observe where Miss Cathey fell?
A. Well, she fell back behind me and she must have hit her head on the bowling machine."

The Court attempted to limit the application of this evidence in his instruction number sixteen saying that assaults on Myrtle Patricia Cathey prior to the date of the assault alleged in the indictment was received for a limited purpose (Tr. 670). This instruction was excepted to by the attorneys for appellant (Tr. 608) for the reason that there was only one assault prior to January 22, 1955, but the real effect of the evidence was to prejudice the jury against the appellant and tend to corroborate the testimony of the witness Marvin T. Jennings.

All the evidence which tended to show in any way that appellant inflicted wounds upon the deceased which resulted in her death was purely circumstantial evidence and the jury should not have been permitted to draw the conclusion that appellant was guilty of manslaughter. The witness Marvin T. Jennings was not certain as to what happened in his car (Tr. 200).

"Q. Is there any way that you can be positive that it was due to a blow that she went over against the door?
A. He either slapped her or hit her, I don't know which.
Q. But you didn't see any of it?
A. No, sir.
Q. You, from the sounds that is what you are going by?
A. Yes, sir.

Q. And you can't tell by the sound exactly what force was used, is that correct?

A. That is correct.

Q. If he was using his open hand it would make a lot more noise than his fist, is that true?

A. Yes, sir."

Dr. Harvey W. Anderson was not certain as to the cause of death. He testified that the bruise between the shoulder blades of deceased was caused by a large object (Tr. 52).

"Q. And from your observation of the body could you tell us whether or not it was a large or small object?

A. Well, the one bruise was seven inches across, the one behind, between the shoulder blades. That was the largest bruise she had, that would have to be the largest object."

He also testified as follows (Tr. 55):

"Q. You have described the cause of death as being subdural hematoma?

A. Yes.

Q. What would that have been?

A. Spontaneous subarachnoid hemorrhage occasionally occurs."

He also testified as follows (Tr. 75):

"Q. And then you took some stitches in the lip?

A. Yes.

Q. And the lower lip, isn't it a fact, Doctor, you had to pull it, kind of expose it, to make those stitches?

A. Slightly.

Q. How many stitches did you put in the lower lip?

A. I don't recall exactly.

Q. How many in the upper?

A. I don't recall either location. Several.

Q. Well, Doctor, would those injuries to the lips be of such a nature that they might cause death?

A. No.

Q. Call them more or less superficial wounds or contusions?

A. I would."

He also testified as follows (Tr. 85):

"Q. In your experience, Doctor, have you ever had a case where there was an instantaneous breaking of blood vessels in the brain causing instant death, cerebral hemorrhage?

A. I haven't had a patient who died, but I have had many, not many but, oh, perhaps three or four patients who have had spontaneous brain hemorrhages. None of these happened to die. The mortality figure on such cases are high, however."

He also testified as follows (Tr. 49-50):

"Q. (By Mr. Stevens) Well, by examining the wounds alone, Doctor, could you tell us whether or not any type of instrument was used to inflict those wounds?

A. Well, an instrument such as a knife, of course, would leave a cut. There were no such wounds as that.

Mr. Taylor. Just a moment, I am going to object. I think the answer calls for a yes or no.

The Court. I will strike the answer of the witness.

Dr. Anderson. The question was, did I think—
The Court. Maybe it should be read, Doctor.
(Thereupon, the reporter read the question.)
Dr. Anderson. No."

Certain exhibits, numbers one to six, inclusively, were admitted in evidence over the objections of attorneys for appellant and the admission of all these exhibits was prejudicial and they were not legally admissible.

In a case of this kind, where the prosecution relies almost entirely upon circumstantial evidence for a conviction, the evidence must not only be consistent with guilt but inconsistent with innocence (*Karn v. United States,* 158 F. 2d 568; Wharton's Criminal Evidence, Vol. 2, Sec. 922, p. 1603).

THE DISTRICT COURT ERRED IN ADMITTING IN EVIDENCE THE ENLARGED PICTURES OF THE BODY OF THE DECEASED, MYRTLE PATRICIA CATHEY, WHICH ENLARGEMENTS WERE DISTORTED, OVER THE OBJECTION OF THE ATTORNEYS FOR DEFENDANT.

These exhibits, Government identification numbers one to six, inclusive, were all offered and introduced at the same time, over the objection of the attorneys for appellant (Tr. 135). Part of the pictures were of the head of deceased and part were of the body. The bruises on the body shown in the pictures, and on the lips of the deceased, according to the testimony of Dr. Anderson, had nothing whatever to do with causing the death of deceased and the only purpose which they could serve would be to inflame the minds

of the jurors and prejudice them against the appellant (*State v. Miller,* 43 Ore. 325, 74 Pac. 658; *State v. McKay,* 132 N.W. 741-746).

The bruises on the lips of the deceased and the bruises on her body had nothing whatever to do with the death of deceased and there is no evidence of any kind, tending to show that appellant caused the bruises upon the body of the deceased. In fact, for the jury to find that appellant caused any bruises found upon the head of deceased must be based upon suspicions, probabilities, and suppositions, which do not warrant a conviction (Wharton's Criminal Evidence, Vol. 2, p. 1605).

We are all familiar with the most recent cases in Oregon and in most of the States, as well as in the Federal Court, that pictures, even though gruesome, are admissible in evidence when they show the wounds which caused death, and the Oregon case has never been reversed to the extent that such pictures are admissible, for any purpose, when they do not show the wounds that caused the death of the deceased or where there is not sufficient evidence to connect the accused with inflicting the wounds.

THE DISTRICT COURT ERRED IN REFUSING TO INSTRUCT THE JURY REGARDING THE LAW OF CIRCUMSTANTIAL EVIDENCE AT THE REQUEST OF THE ATTORNEYS FOR DEFENDANT.

The only instruction given by the Court in which circumstantial evidence is mentioned is instruction number 15, which reads as follows (Tr. 669):

"(15) Two classes of evidence are recognized and admitted in courts of justice, upon either or both of which, if adequately convincing, juries may lawfully find an accused guilty of crime. One is direct evidence and the other is circumstantial. Direct evidence of the commission of a crime consists of the testimony of every witness who, with any of his own physical senses, perceived any of the conduct constituting the crime, and which testimony relates what thus was perceived. All other evidence admitted in the trial is circumstantial, and insofar as it shows any acts, declarations, conditions or other circumstances tending to prove a crime in question, or tending to connect the defendant with the commission of such a crime, it may be considered by you in arriving at a verdict. The law makes no distinction between circumstantial evidence and direct evidence as to the degree of proof required for conviction, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof. Either will support a verdict of guilty if it carries the convincing quality required by law, as stated in my instructions."

Exception to the instruction was taken by the attorneys for appellant (Tr. 680, 681) as follows:

(Tr. 680) "We are going to object to the, to Instruction No. 15 upon the grounds that that doesn't correctly describe what constitutes circumstantial evidence and the degree or the—strike that, will you, please, and the necessity of the chain of circumstantial evidence leading directly from the crime to the defendant. In other

words, it is, the definition as given in Instruction No. 15 is not sufficient."

(Tr. 681) "Mr. Taylor. No, I got one more. I am going to object to the failure of the Court to give a definition of circumstantial evidence in the degree of consideration that must be given to it by the jury.

The Court. Is that everything?

Mr. Taylor. That is everything."

We are familiar with the case of *Holland v. United States,* in Volume 348 U.S., page 121, in which is stated, on pages 139 and 140, as follows:

"The petitioners assail the refusal of the trial judge to instruct that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt. There is some support for this type of instruction in the lower court decisions, Garst v. United States, 180 F. 339, 343; Anderson v. United States, 30 F. 2d 485, 487; Stutz v. United States, 47 F. 2d 1029, 1030; Hanson v. United States, 208 F. 2d 914, 916, but the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect. United States v. Austin-Bagley Corp., 31 F. 2d 229, 234, cert. denied, 279 U.S. 863; United States v. Becker, 62 F. 2d 1007, 1010; 1 Wigmore, Evidence (3d ed.), §§25-26."

Examining the opinion of the United States Court of Appeals for the Tenth Circuit in the same case of *Holland v. United States* in 209 F. 2d 516, in paragraphs 14 and 15, page 523, we find the following:

> "The jury was repeatedly admonished that the government's case was based upon circumstantial evidence and that before they could convict the appellants, they must believe that evidence beyond a reasonable doubt. In that connection, they were told to use their common sense in determining what inferences might reasonably be drawn from the circumstances which they thought were established by the proof. While circumstantial evidence was not defined in time-honored terms that it must be consistent with guilt and inconsistent with any other hypothesis, we do not think the court left any doubt in the minds of the jury of the nature of the proof or how it should act upon it."

In this case there was no instruction of any kind, or nothing said, in regard to circumstantial evidence, except as stated in said Instruction No. 15. The rule has been followed by practically all the state courts and all the federal courts for many years that circumstantial evidence must be consistent with guilt and inconsistent with any reasonable hypothesis and it is our contention that the appellant, where all the evidence was circumstantial, was entitled to the protection of an adequate instruction in regard to the law of circumstantial evidence.

It seemed to be the opinion of the District Court that the decision in the Supreme Court in the *Holland* case made it absolutely unnecessary for the trial court to give any instruction in regard to the law of circumstantial evidence. Under that instruction the jury had a right to believe that everything that was

admitted in evidence and all of the testimony, purely circumstantial, indicated that the defendant was guilty. Notwithstanding the opinion of the trial court that there was sufficient evidence to warrant a conviction of murder in the first degree, the jury returned a verdict of manslaughter. We do not believe that the Supreme Court of the United States intended that when a murder case is based solely on circumstantial evidence, that the defendant is not entitled to the required instruction, which has always been followed by all of the courts, that said evidence must be consistent with guilt and inconsistent with innocence.

In this case the jury, under the instructions of the Court, and the admission of testimony over the objection of the attorneys for appellant, and principally upon the testimony of the witness Mr. Meyers of an assault shortly after the 1st of January, 1955, felt that appellant was guilty of assault and battery and that in some manner he should be punished, hence the verdict of guilty of manslaughter. Undoubtedly if the jury believed, beyond a reasonable doubt, that appellant had killed Myrtle Patricia Cathey they would not have returned a verdict of manslaughter but murder in the second degree. They did not believe the testimony of appellant that Myrtle Patricia Cathey did leave the Alibi Club on the early morning of January 22, 1955 and did not return until about two or three o'clock in the afternoon of said day. No attempt was made by the Government to investigate his said statement and so the burden of proof as to

the truth of the statement rested entirely upon appellant. He was found guilty because he was unable to prove his innocence and under the decision of this Court in the *Karns* case, above cited, the presumption of innocence follows the defendant during the entire trial of the case and it is not incumbent upon him to prove his innocence (Wharton's Criminal Evidence, 11th Edition, Vol. 2, p. 1608, also Sec. 925, pp. 1616-1618).

For the reasons stated, we believe that a judgment of acquittal should be ordered or in the alternative that the decision of the District Court be reversed and a new trial ordered.

Dated, Fairbanks, Alaska,
April 12, 1956.

Respectfully submitted,
WARREN A. TAYLOR,
JULIEN A. HURLEY,
Attorneys for Appellant.